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In The

# Supreme Court of the United States

BENJAMIN J. CAYETANO and EARL I. ANZAI,

*Petitioners,*

v.

CHEVRON USA, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/ COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Does the Takings Clause authorize a court to invalidate state rent control or land use regulatory legislation on its face, without regard to whether it diminishes economic value or use or causes any physical invasion of the plaintiff's property, when the court concludes that the statute does not substantially advance a legislative purpose?

2. Does the facial constitutional validity of state legislation depend on whether a federal court predicts that it will achieve its objective?

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## BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/ COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

*Amici Curiae* Council of State Governments, National Association of Counties, National League of Cities, International Municipal Lawyers Association, and International City/County Management Association respectfully submit this brief in support of petitioners, Benjamin J. Cayetano and Earl I. Anzai.[1]

## INTEREST OF *AMICI CURIAE*

*Amici* collectively represent thousands of members, including states, counties, municipalities, and their officials and legal advisors. *Amici*'s members are responsible for drafting, passing, administering, and defending land use regulations in thousands of jurisdictions nationwide,

[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief, other than a contribution toward the printing costs by the Institute for Local Self-Government, a California non-profit entity that is the research and education affiliate of the California League of Cities, a member of *amicus* National League of Cities.

and thus have a manifest interest in this regulatory takings case.

*Amici* have particular concerns about the Ninth Circuit's decision in this case, which applies heightened means-ends scrutiny to a land use regulation to determine just compensation liability under the Takings Clause. *Amici*'s members in the nine states and nearly two thousand localities in the Ninth Circuit are concerned about the immediate chilling effect this decision will have on state and local efforts to address emerging land use problems by reasonable regulation. They are also concerned about spending their limited resources on defending challenges to existing regulation under a level of scrutiny unprecedented in the modern era.

*Amici*'s members in the states of California and Washington are concerned that the Ninth Circuit's decision creates a conflict between state and federal courts in the same jurisdiction, thus raising the additional problem of forum-shopping and of planning in light of conflicting standards that may be applied to the same legislation.

*Amici*'s members nationwide are concerned about the deep conflict that has now spread to two United States Courts of Appeals, four state supreme courts, and the Court of Federal Claims, which have formulated widely varying approaches in attempting to construe this Court's ambiguous precedent in this area. *Amici* believe that the uncertainty and confusion caused by this conflict burdens all state and local governments, and that this Court could lift that burden by granting the petition in this case and providing definitive guidance.

## REASONS FOR GRANTING THE PETITION

### I. The State And Local Governments And Officials Represented By *Amici* Urgently Need Clarification Whether A Land Use Regulation's Failure To Survive Heightened Means-Ends Scrutiny Can Trigger Liability For Just Compensation Under The Takings Clause.

The lower court's decision in this case has caused immediate practical problems for *amici*'s members in the Ninth Circuit responsible for drafting, passing, administering, and defending land use and rent control regulations. Set against other conflicting lower court decisions and this Court's own ambiguous pronouncements, the decision has also increased uncertainty among all of *amici*'s members.

The court below held that a gas station rent control regulation may on its face effect a taking of private property requiring just compensation if there is a sufficient chance that it will not achieve its stated goal of controlling retail gas prices – even if the regulation allows a reasonable return on investment. *See* Pet. App. 23-24. The court then indicated the seriousness with which it viewed the requirement that the rent control provision "substantially advance" the goal of controlling gas prices by remanding for a full trial on the issue whether the provision met this requirement, anticipating further testimony by economic experts from both sides. *See* Pet. App. 24.

As detailed below, this disposition places the Ninth Circuit in conflict with the Fourth Circuit, the highest courts of California, New York, Rhode Island, and Washington, and the Court of Federal Claims. For states and

localities that are not in any of those jurisdictions, this conflict produces uncertainty as to which standard will apply to their land use regulations. For the nine states and almost two thousand municipalities that are located in the Ninth Circuit, the decision both immediately chills efforts to address emerging local land use problems through legislation, and requires preparation for challenges to existing legislation under means-ends scrutiny unprecedented in the modern era. For the states of California and Washington and their localities, the conflict creates the additional complication and unfairness of forum shopping, since their state and federal courts will now be applying different federal constitutional rules. Thus, for all of the states and localities represented by *amici*, the Ninth Circuit's decision creates an urgent need for this Court to clarify the law in this area.

### A. States and localities need to know whether a means-ends test forms any part of the determination of just compensation liability, a matter of disagreement separating the Ninth Circuit from the Rhode Island and Washington Supreme Courts and the Court of Federal Claims.

The Ninth Circuit's decision in this case that just compensation liability under the Takings Clause may be triggered by a land use regulation's failure to meet a means-ends test squarely conflicts with decisions of the Rhode Island and Washington Supreme Courts and the Court of Federal Claims:

- In *Brunelle v. Town of South Kingston*, 700 A.2d 1075 (R.I. 1997), the Rhode Island Supreme Court specifically rejected the trial court's conclusion that a regulation could effect a taking if it did not substantially advance a legitimate state interest. To the contrary, an examination of this Court's precedent convinced Rhode Island's highest court that "the arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause." *Id.* at 1083 n.5.

- In *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 261 (Wash. 1998), the Washington Supreme Court held that a claim of "[a]rbitrary or irrational refusal or interference with processing a land use permit" was properly analyzed under the Fourteenth Amendment Due Process Clause rather than the Fifth Amendment Takings Clause. That holding produced a dissent by Justice Talmadge arguing that the Ninth Circuit's decisions in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) and *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997), required such claims to be treated under the Fifth Amendment Takings Clause. *See id.* at 985 n.14 (Talmadge, J., dissenting).

- Most recently in *Bamber v. United States*, 45 Fed. Cl. 162, 166 (1999), the Court of Federal Claims reaffirmed its position that a claim that a government action failed to substantially advance a legitimate state interest "is not a takings claim." The court commented that "this alternative takings analysis, first alluded to in *Agins* [*v. City of Tiburon*, 447 U.S. 255, 260 (1980)], has not had a fruitful life," *id.* at 165, and suggested that more recent decisions of this Court confined *Agins* narrowly to "circumstances in which regulators attempt, without any real basis for doing so, to create

public access to privately held real property." *Id.* at 165-66.

The conflict between the Ninth Circuit and these lower courts on the issue whether means-ends scrutiny has any place in the Takings Clause has produced uncertainty among many of the state and local officials represented by *amici*, most pointedly in the state of Washington where there is now a conflict between state and federal courts in the same jurisdiction. Only a definitive statement from this Court can put an end to this uncertainty.

### B. States and localities need to know whether a heightened means-ends test is properly applied to determine just compensation liability, a matter of disagreement separating the Ninth Circuit from the Fourth Circuit, the California Supreme Court, and the New York Court of Appeals.

Although the Ninth Circuit, the Fourth Circuit, and the highest courts of California and New York all agree that Takings Clause analysis includes a means-ends test, they radically differ as to the appropriate standard for that means-ends scrutiny:

- In *Greenspring Racquet Club, Inc. v. Baltimore Cty.*, 232 F.2d 887, 2000 WL 1624496, **5 (4th Cir. Oct. 31, 2000), *petition for cert. filed*, No. 00-1227 (January 29, 2001), the Fourth Circuit held that there was virtually no role for independent judicial assessment of the relationship of land use regulations to their asserted purposes, concluding that "[w]hen statements by local lawmakers set out legitimate reasons for imposing . . . restrictions on property . . . , there can be no

claim in federal court that the law fails to substantially advance a legitimate purpose." *Id.* at **5.

- In *Santa Monica Beach, Ltd. v. Superior Ct.*, 968 P.2d 993 (Cal. 1999), the California Supreme Court held that the appropriate standard for a Takings Clause means-ends test was not a "heightened intermediate scrutiny standard," but a standard inquiring only whether the challenged regulation is "arbitrary," which should not limit itself to the stated goals of the regulation. *See id.* at 1004. This portion of the court's holding drew separate, pointed dissents from Justices Baxter, Chin, and Brown. *See id.* at 1026-1029 (Baxter, J., dissenting); *id.* at 1036-1038 (Chin, J., dissenting); *id.* at 1040-1042 (Brown, J., dissenting). It also drew a concurrence from Justice Kennard specifically requesting this Court to address the issue whether "outside the *Nollan/Dolan* context . . . a means-end test [should] be used to determine whether a taking has occurred, or instead [whether] means-end testing [should] remain within due process jurisprudence." *Id.* at 1013 (Kennard, J., concurring).

- In *Bonnie Briar Syndicate v. Mamaroneck*, 721 N.E. 2d 971 (N.Y. 1999), the Court of Appeals of New York rejected the landowner's argument that a zoning law could pass Takings Clause review only if the government could show a "close causal nexus" between its objectives and the law's operative provisions. Rather, it concluded that the law would pass means-ends scrutiny if it bore "a reasonable relationship to the legitimate objectives stated within [the] law," *id.* at 976, a lenient standard since it is "not for this Court to determine if, in regulating land use, the rezoning determination was more stringent than one might reasonably conclude was necessary to further public objectives." *Id.*

By contrast, in the instant case the Ninth Circuit remanded for a full trial of the issue whether the challenged rent control provision will further the stated purpose of the provision, namely to control retail gas prices. *See* Pet. App. 27. Thus, in direct conflict with the California Supreme Court, the Ninth Circuit requires the Takings Clause means-ends test to consider only those ends explicitly stated by the legislature. Additionally, in conflict with the Fourth Circuit and the New York Court of Appeals as well as the California Supreme Court, the Ninth Circuit does not use a deferential means-ends standard, but requires trial courts to admit detailed evidence from both parties predicting the success or failure of the challenged provision to achieve its stated ends, and then to resolve any conflicts in the evidence presented with no apparent deference to the government. *See id.* (directing the District Court to resolve factual issues raised by conflicting evidence as to "whether incumbent dealers will capture a premium based on the increased value of their leaseholds due to the imposition of a maximum permissible regulated rent, thereby depriving new dealers and consumers from reaping the benefits of Act 257," and as to "whether oil companies will raise the wholesale price of fuel and thereby unilaterally offset the benefits of the Act").

This aspect of the ruling below gains the support of only two of the three panel members; Judge Fletcher, concurring in the judgment, specifically rejects the majority's embrace of heightened scrutiny, arguing that its holding "undermines or even contradicts [this Court's] decisions in ordinary rent control cases such as *Pennell* [*v.*

*City of San Jose*, 485 U.S. 1 (1988)], and *Bowles v. Willingham*[, 321 U.S. 503 (1944)], as well as threatens its decisions in price control cases such as *FCC v. Florida Power*[ *Corp.*, 480 U.S. 245 (1987)] and the *Permian Basin Area Rate Cases*[, 390 U.S. 747 (1968)]." *Id.* at 1047 (Fletcher, J., concurring in the judgment). Nonetheless, the ruling below is now binding precedent in the Ninth Circuit, and burdens the nine states and hundreds of localities in the Ninth Circuit's jurisdiction – particularly California and its localities, which now must face conflicting approaches in their state and federal courts. Only guidance from this Court can resolve that conflict and the uncertainty facing thousands of other governmental bodies represented by *amici*.

## II. This Case Is The Appropriate Vehicle For Resolving The Conflict Between The Lower Courts And Providing Guidance On Whether Means-Ends Scrutiny Has Any Role In Determining Just Compensation Liability Under The Takings Clause.

This Court is unlikely to find a better case to use as a vehicle for resolving the conflict between lower courts on the role of means-ends analysis under the Takings Clause. The issue has been developed extensively in the lower courts, and the conflicts will persist without further guidance from this Court. The Ninth Circuit's decision now creates, for the first time, a conflict between state and federal courts in California and Washington, producing the complication and unfairness of forum-shopping. The decision below cleanly frames the constitutional issue, and produces immediate adverse consequences not only for the petitioner but also for the nine states and almost

two thousand localities whose land use regulations must now face heightened means-ends scrutiny under the Takings Clause.

### A. The well-developed conflict in the lower courts has now reached a critical forum-shopping stage and will persist without this Court's guidance.

In five key cases, this Court has sent ambiguous, conflicting signals about the role of means-ends scrutiny under the Takings Clause. Together, these cases have generated confusion in the lower courts that will persist and spread without further guidance from this Court.

- In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court mentioned for the first time the possibility that a land use provision might effect a taking if it "[did] not substantially advance legitimate state interests"; but this remark was dictum, and cited for its only support *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), a case decided under the Fourteenth Amendment Due Process Clause rather than the Fifth Amendment Takings Clause.

- In *Nollan v. California Coastal Commission*, 483 U.S. 825, 834-837 (1987), this Court cited *Agins* in support of the "essential nexus" test it crafted for exactions; but the essential nexus test turns out not to be a means-ends test at all, as it instead compares two ends – the purpose supporting a land use restriction, and the purpose of an exaction on which relaxation of the restriction is conditioned. *See id.* at 837 ("unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use").

- In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court further developed *Nollan*'s exactions jurisprudence; but it conspicuously shifted the rationale underlying the exactions doctrine from the *Agins* means-ends test to the "well-settled doctrine of 'unconstitutional conditions,' " under which "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* at 385.

- In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality of this Court concluded that the Coal Industry Retiree Health Benefit Act of 1992 violated the Takings Clause; but five members of the Court concluded that economic legislation should be reviewed under the Due Process Clause rather than the Takings Clause, *see id.* at 545 (Kennedy, J., concurring in the judgment); *id.* at 554 (Breyer, J., dissenting), and Justice Kennedy's pivotal opinion specifically noted that the means-ends analysis set out in *Agins* "is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act." *Id.* at 545 (Kennedy, J., concurring in the judgment)

- Finally, in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687 (1999), this Court concluded that the issue of means-ends scrutiny under the Takings Clause was not properly before it because the petitioner had itself formulated jury instructions containing a means-ends test, *see id.* at 704; but the Court then sounded dissonant notes of caution and reassurance, warning that it had never provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance a

> legitimate public interest outside the context of required dedications or exactions," *id.*, while noting that "the trial court's instructions are consistent with our previous general discussions of regulatory takings liability." *Id.* In their separate opinions, Justice Scalia and Justice Souter both specifically reserved the question whether failing a means-ends test should ever trigger just compensation liability. *See id.* at 732 n.2 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 753 n.12 (Souter, J., concurring in part and dissenting in part).

The lower courts, faced with these five wavering signposts, have understandably been unable to come to any agreement on the proper direction of means-ends jurisprudence under the Takings Clause. By now, two United States Courts of Appeals, four state supreme courts, and the Court of Federal Claims have formulated varying approaches, often over dissents suggesting the close and difficult nature of the issues.

With the Ninth Circuit's decision below, the conflict has reached a critical stage, because the states of Washington and California and their localities now must deal with different versions of the Takings Clause in state and federal court. Thus, there is at this point nothing to be gained from awaiting additional development of the issue, and every reason to provide immediate further guidance.

**B. The decision below has cleanly framed the constitutional issue and produces immediate adverse consequences for petitioner and the other eight states and nearly two thousand localities in the Ninth Circuit.**

The chief import of the Ninth Circuit's decision in this case is to set out a novel strict standard to judge the constitutionality both of the rent control legislation at issue in this case and of land use regulation throughout nine states in the western third of this nation. That decision was rendered in the context of litigation that had come to focus on the precise issue of the proper role of means-ends scrutiny under the Takings Clause.

In the District Court, the parties in this case submitted cross motions for summary judgment, agreeing that what divided them was a question of law concerning the use of means-ends scrutiny under the Takings Clause. The District Court denied the petitioner's motion and granted the respondent's, concluding that the Takings Clause required a level of heightened means-ends scrutiny which the rent control provisions could not pass.

On appeal, the Ninth Circuit affirmed the District Court's ruling that the Takings Clause required heightened means-ends scrutiny of land use legislation, and thus cleanly framed the constitutional issue for review in this Court. However, in spite of the fact that neither party had raised the existence of genuine issues of material fact in the District Court, the court then proceeded to decide that there were factual issues left under the strict standard it had set, and remanded for trial. *See* Pet. App. 14 n. 5, 27.

There is absolutely no reason that the remand order appended to the Ninth Circuit's judgment should insulate its novel holding from review in this Court. This is not a state court case in which a final judgment of the court below is a prerequisite to jurisdiction. Rather, this is a petition to review a case in a federal court of appeals, and this Court has unquestioned plenary jurisdiction to review such cases "[b]y writ of certiorari granted upon a petition of *any party to any civil or criminal case, before or after rendition of a judgment or decree.*" 28 U.S.C. § 1254(1) (emphasis added). Recognizing this authority, this Court has granted review of judgments containing remand orders in numerous cases. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *United States v. General Motors*, 323 U.S. 373, 377 (1945).

This case clearly warrants exercise of this Court's undoubted authority to review the Ninth Circuit's judgment at this juncture. It is true that petitioner State of Hawaii could conceivably prevail on remand, but only after being forced to develop and present voluminous evidence about the economics of land markets and wholesale and retail gasoline markets in that state. The burden of that further litigation represents an immediate adverse consequence of the Ninth Circuit's judgment on petitioner. More importantly, such a victory on remand would not affect the status of the Ninth Circuit's holding as binding precedent on federal courts in nine states. Rather, it would only prevent this Court from reviewing that holding, chilling state and local legislation for an indefinite period until another appropriate case arose. In

the interest of the thousands of state and local governments and officials that *amici* represent, *amici* respectfully request this Court not to postpone indefinitely consideration of this important issue, but to grant the petition in this case and provide much needed guidance to the lower courts.

## CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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